QUESTION PRESENTED

Whether the United States, when it has paid benefits to an injured federal employee under the Federal Employees' Compensation Act, is entitled to the same immunity from suit by a third party for indemnity or contribution as would inure to a private employer who had paid compensation to an injured employee pursuant to the applicable state workers' compensation law.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-456

BELL HELICOPTER TEXTRON, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The second opinion of the court of appeals (Pet. App. 1a-6a) is reported at 967 F.2d 307. The first opinion of the court of appeals (Pet. App. 21a-29a) is reported at 833 F.2d 1375. The second opinion of the district court (Pet. App. 9a-20a) is reported at 755 Supp. 269. The first opinion of the district court (Pet. App. 30a-38a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1992. A petition for a writ of certiorari was

filed on September 14, 1992 (a Monday).[1] This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 13, 1979, a helicopter leased by the National Oceanographic and Atmospheric Administration (NOAA) and piloted by one of its employees crashed while en route from Anchorage, Alaska, to Seattle, Washington. Passenger Gary Mitchell, a civilian employee of the NOAA, was injured. Pet. App. 23a, 30a.

Mitchell received compensation pursuant to the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.* He also brought a tort action in the Alaska Superior Court against petitioner Bell Helicopter Textron, Inc. (the manufacturer of the helicopter), Sea Airmotive, Inc. (the seller of the helicopter), and Gay Airways, Inc. (the lessor of the helicopter). Mitchell claimed that these parties were liable to him for manufacturing and furnishing the helicopter to the government in an uncrashworthy condition. On February 20, 1985, the parties settled the case for approximately $2.4 million. Pet. App. 23a-24a.

2. Petitioner subsequently sued the United States for indemnity or contribution under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346, 2671 *et seq.*, which waives sovereign immunity under certain circumstances and renders the United States liable

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[1] Sea Airmotive, Inc. and Gay Airways, Inc., also plaintiffs and appellants below, have filed a separate petition for certorari, No. 92-457. The United States was served in these cases at different times, and therefore previously filed its opposition to the petition for certiorari in No. 92-457 on November 13, 1992.

"to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. Petitioner alleged that the crash occurred because the pilot of the helicopter, a federal employee, negligently failed to undertake proper pre-flight planning. Pet. App. 31a.

The district court granted the government's motion to dismiss. Pet. App. 30a-38a. In Alaska,[2] once an employer, pursuant to the state workers' compensation law, compensates an employee for a work-related accident, the employer is not subject to a suit for indemnity or contribution by a third party against whom the employee has recovered in a suit concerning the same accident. *Id.* at 31a. The district court agreed that because the FTCA renders the United States liable only to the same extent as a private party under like circumstances, the government was entitled by analogy to the immunity from contribution or indemnity that state law would have granted a similarly situated private employer. *Id.* at 34a.

3. The court of appeals affirmed the district court's ruling on the contribution issue. Pet. App. 21a-29a. Relying on its earlier decision in *LaBarge* v. *County of Mariposa*, 798 F.2d 364 (9th Cir. 1986), cert. denied, 481 U.S. 1014 (1987), the court considered "how Alaska law would be applied to an Alaska employer in similar circumstances." Pet. App. 26a. Recognizing that "the federal government could never be exactly like a private actor," the court sought "the most reasonable analogy." *Id.* at 27a. Because the court

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[2] The accident occurred in Canada, but the allegedly negligent planning occurred in Alaska, and the parties agreed below that Alaska law applied. Pet. App. 24a, 25a.

found FECA "comparable to a state workers' compensation law," it concluded that the United States was entitled to "the same immunity from suit enjoyed by a private employer covered by" the Alaska law. *Ibid.*

The court of appeals affirmed the dismissal of petitioner's claim for contribution, but also found that the district court had not adequately addressed the claim of implied indemnity and remanded for further consideration of that issue under Alaska law. Pet. App. 28a-29a. On remand, the district court ruled that petitioner could not recover on any theory of indemnity. *Id.* at 30a-38a. The court of appeals affirmed. *Id.* at 1a-6a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court.[3] The courts of appeals that have addressed analogous issues in recent years have adopted similar interpretations of the FTCA. Accordingly, the petition does not present any issue that warrants review by this Court.

1. Petitioner argues that the lower courts looked to the wrong state law in determining the applicable "law of the place where the act or omission occurred"

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[3] Petitioner argues that the judgment of the court of appeals contradicts this Court's holding in *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190 (1983), that FECA does not itself bar a third-party action for indemnity. Pet. 11-12. The United States addressed this argument in its opposition to the petition for certiorari in *Sea Airmotive, Inc.* v. *United States*, No. 92-457, a copy of which has been served on counsel in this case.

under the FTCA, 28 U.S.C. 1346(b). Pet. 12-17. Petitioner claims that the government should not enjoy the immunity that Alaska workers' compensation law would provide to a private employer from claims for indemnity or contribution.

a. First, petitioner argues that *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190 (1983), "implicitly rejected" the analogy adopted by the court of appeals. Petitioner reasons that this result is foreclosed because the government did not argue in *Lockheed*, and the Court did not find, that the District of Columbia workers' compensation law barred the plaintiff's third-party claim. Pet. 13-14, 17. The only issue decided by the court of appeals and presented to this Court in *Lockheed*, however, was whether the exclusive liability provision of FECA, 5 U.S.C. 8116(c), itself barred an action for indemnity. 460 U.S. at 197 n.8. What this Court did not say in response to an argument that was not before it is not the law. What this Court did say in *Lockheed* was that it was remanding the case for consideration of whether the plaintiffs were entitled to recover under the relevant substantive law of the District of Columbia.[4]

b. Second, petitioner argues that, because the United States is not directly subject to the requirements of the Alaska Workers' Compensation Act, it therefore should not receive the benefit of that statute. Pet. 14-16. In numerous situations, the courts of appeals have held that the federal government should receive the advantage of a state statute

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[4] Petitioner's speculations about how Congress might have worded FECA, Pet. 9, are similarly irrelevant.

that would protect an analogous private party from tort liability, even though the statute does not literally apply to the federal government.

For instance, in addition to the court of appeals in this case, two other courts of appeals have held that the federal government should receive the same immunity from a third-party suit for indemnity or contribution as a private employer would enjoy under a state workers' compensation law. *General Electric Co.* v. *United States*, 813 F.2d 1273 (4th Cir. 1987), vacated on other grounds, 484 U.S. 1022 (1988); *In re All Maine Asbestos Litigation (PNS Cases)*, 772 F.2d 1023 (1st Cir. 1985), cert. denied, 476 U.S. 1126 (1986). Several courts have held that the United States may take advantage of a state statute placing a cap on damages in a medical malpractice suit, even if the state statute literally applies only to medical facilities that have a state license which the federal medical facility in which the malpractice occurred did not have. *Starns* v. *United States*, 923 F.2d 34 (4th Cir.), cert. denied, 112 S. Ct. 54 (1991); *Taylor* v. *United States*, 821 F.2d 1428 (9th Cir. 1987), cert. denied, 485 U.S. 992 (1988); *Lucas* v. *United States*, 807 F.2d 414 (5th Cir. 1986). Courts have also held that state statutes limiting the liability of private landowners who open their land to the public for recreational purposes likewise limit the liability of the United States for injuries to users of national parks regardless of whether the state statute was intended to apply to government-owned land. *Proud* v. *United States*, 723 F.2d 705 (9th Cir.), cert. denied, 467 U.S. 1252 (1984); *Mandel* v. *United States*, 719 F.2d 963 (8th Cir. 1983). And the courts have applied state

"collateral source" statutes, which by their terms cover only state-licensed health care providers, to reduce the liability of the United States for medical malpractice occurring in federally operated facilities. *Reilly* v. *United States*, 863 F.2d 149 (1st Cir. 1988); *Scheib* v. *Florida Sanitarium & Benevolent Ass'n*, 759 F.2d 859 (11th Cir. 1985). Thus, the court of appeals here was correct in permitting the United States to take advantage of the immunity that the state workers' compensation law would have provided to a similarly situated private employer, even though the government was not literally subject to the terms of the law.

2. Petitioner's reliance on *United States* v. *Muniz*, 374 U.S. 150 (1963), and *Wright* v. *United States*, 719 F.2d 1032 (9th Cir. 1983), is misplaced. Those cases involve instances in which the United States may not be entitled to the immunity that state law would afford to a *public* party such as a municipality or public official. The immunity at issue here is one that state law affords to a *private* party, and the FTCA expressly makes the liability of a similarly situated private party under state law the standard for government liability.

3. Finally, petitioner argues that, if third-party claims for indemnity or contribution against the United States, arising out of injuries to federal employees, depend upon the local workers' compensation laws, then the uniformity of federal law construing the FECA will be sacrificed. Pet. 17-22. But petitioner errs in characterizing this case as one requiring construction of FECA; this case concerns the FTCA. And application of analogous state law is

precisely what is required by the FTCA: "the law of the place where the act or omission occurred" supplies the rule of decision. 28 U.S.C. 1346(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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